

Manor West, Inc. and Service Employees International Union, AFL-CIO, CLC, Local Union No. 627, Petitioner. Case 8-RC-14915

March 2, 1994

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

On June 8, 1993, the Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended, to represent the Employer's licensed practical nurses (LPNs).¹ A hearing was held on June 29 and 30 and July 14 and 15, 1993, before a duly designated hearing officer of the National Labor Relations Board. On August 9, 1993, pursuant to Section 102.67 of the Board's Rules and Regulations, the case was transferred to the Board for decision.

Having carefully reviewed the entire record in this proceeding, including the posthearing briefs filed by all the parties, the Board makes the following findings:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. Manor West, Inc. (the Employer) operates a 98-bed skilled nursing home and retirement center in Austintown, Ohio. The Petitioner seeks to represent a unit of approximately 20 LPNs employed at this facility. The Employer contends that LPNs do not constitute an appropriate unit because they are statutory supervisors.² Applying the principles set forth in the Board's recent decision in *Northcrest Nursing Home*, 313 NLRB 491 (1993), we find that LPNs are not supervisors within the meaning of Section 2(11) of the Act.

I. ORGANIZATIONAL STRUCTURE

The Employer's facility consists of three wings, each with a separate nursing station. The Employer employs approximately 10 registered nurses (RNs), 20 LPNs, and 29 nurses aides.

¹The Petitioner initially filed a petition in Case 8-RC-14907 for a combined unit of LPNs and service and maintenance employees. The parties subsequently stipulated to an election involving only the service and maintenance employees. Thereafter, the Petitioner filed the instant petition seeking to represent LPNs in a separate unit.

²The parties stipulated that a separate unit of LPNs is otherwise appropriate.

Administrator Suzanne Poppelreuter manages and directs operations at the facility. The nursing staff is headed by Director of Nursing Kathy Mehlo and six RN department heads. Staff Development Coordinator Karlton Ware is in charge of staff development and aide training. The parties stipulated that the administrator, director of nursing, staff development coordinator, department heads, other RNs, and Sharon Cole are not eligible to vote in the election.

The facility operates 7 days a week, 24 hours a day, on three shifts. The daily shifts and staffing are as follows: the day shift (7 a.m. to 3 p.m.) is staffed by 8 RNs, 3 LPNs, and 13 aides; the afternoon shift (3 to 11 p.m.) is staffed by 1 RN, 3 LPNs, and 6-11 aides; and the night shift (11 p.m. to 7 a.m.) is staffed by 1 RN, 3 LPNs, and 5 aides. On each shift, there is one RN coordinator in charge and three LPNs, one on duty at each nursing station. The LPNs report to the RN coordinator.

II. SECTION 2(11) INDICIA

Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An LPN who has authority in any one of the listed categories, and exercises that authority in the interest of the employer using independent judgment, is a supervisor. The burden of proving supervisory status is on the party alleging that such status exists. *Northcrest Nursing Home*, supra at 496 fn. 26. Here, the Employer alleges that LPNs are statutory supervisors because they have authority to assign and responsibly direct, transfer, discipline, and evaluate nurses aides. The relevant facts and discussion with regard to each of these alleged supervisory indicia are set forth below.

A. Assignment and Direction

It is undisputed that LPNs assign work to and direct the aides in matters of patient care. The LPNs' primary duty is to ensure that the patients are clean, dry, and comfortable. To carry out this duty, LPNs rely on the aides to feed, bathe, and turn patients according to a schedule, change them when they are wet, and respond to patient call lights. LPNs also make sure that the aides complete bowel and bladder reports, observe proper hygiene protocol, and complete assigned housekeeping duties. LPNs review the work of the aides

while making rounds and instruct the aides if they note a deficiency.

Prior to June 1993, the monthly schedules and daily assignments for each member of the nursing staff had been prepared by RNs. After this date, the Employer changed its practice with respect to the daily assignments by requiring LPNs to assign the aides to work in particular patient care sections. These assignments are based primarily on the Employer's past practice of assigning certain aides to work in particular sections. With regard to other schedule changes, it is undisputed that only RNs and the administrator approve changes in the work schedule or breaktimes, and approve requests for vacation or leaves of absence.

LPNs are responsible for finding replacements when aides "report-off" prior to their shift. Typically, an LPN receives a call from an aide reporting off and completes a report-off slip. The LPN then tries to find a replacement by calling off-duty aides and, if that does not yield a replacement, by asking on-duty aides to work an extended shift. The aides cannot be compelled to work and, if a replacement cannot be found, an LPN divides the work equally among the aides present in order to accommodate the needs of patients. These changes are made without the approval of management.

When an aide fails to punch in or out, the RN or LPN on duty initials the aide's timecard to verify that the aide was present and worked the hours recorded. Similarly, when aides work overtime, LPNs complete "overtime verification" slips to record the amount of overtime worked. Except in the case when aides work overtime to cover a staff shortage, LPNs do not have any authority to approve or grant overtime. Indeed, the record shows at least two instances when LPNs have sought overtime or double-time pay for aides who worked through lunch or performed additional duties to cover for absent employees, and the requests were denied by management.

Both LPNs and RNs sign "incident reports" prepared by aides when they are involved in a work-related injury or accident. The aide gives the completed form to an LPN or RN who then signs the form over the title "supervising nurse." The purpose of the incident report is to document that a work-related accident or injury has occurred. The LPN does not independently investigate the incident or verify the truthfulness of the report, and plays no role in determining whether the aide would be eligible for Workers' Compensation benefits.

To establish supervisory status, the authority to assign and direct the work of aides must first require the use of independent judgment, and second must be exercised "in the interest of the employer," rather than "in the interest of the patient." *Northcrest Nursing Home*, supra. In *Northcrest*, the Board determined that

to the extent charge nurses assign work and direct aides in order to provide sound patient care, these responsibilities are exercised in accordance with their professional or technical judgment, and thus are not the exercise of supervisory authority in the employer's best interest. *Northcrest Nursing*, supra. Applying this patient care analysis, the Board found the charge nurses in *Northcrest* not to be statutory supervisors as their assignment and direction of aides was a product of their professional/technical expertise in the area of patient care. Id. at 496.

The record here shows that LPNs give directions to aides without prior approval from the Employer, using their own judgment to the extent required. These directions may not always be routine. However, as in *Northcrest*, we find that the independent judgment exercised by the LPNs is merely incidental to their function, as technical employees, of treating patients and thus is not the exercise of supervisory authority in the interest of the Employer.

With respect to assignments, LPNs have no role in scheduling because the monthly schedule is completed by an RN supervisor, and only RN supervisors and the administrator make changes to the schedule. Although LPNs daily assign aides, these assignments are not made on the basis of the aides' particular skills, or any other factor which might demonstrate independent judgment on the part of the LPN. Rather, the record shows that assignments are the result of the Employer's past practice of assigning particular aides to particular sections.

The Employer argues that the initialing of timecards when an aide fails to punch in or out indicates that the LPNs are vested with the authority to assign hours. The record evidence, however, shows that the initialing of timecards is merely to acknowledge that the aides actually worked the hours indicated and does not involve the use of independent judgment. Similarly, we reject the Employer's assertion that the "overtime verification" slips signed by LPNs are evidence of their authority to grant overtime. The admitted purpose of these slips is solely to verify that the overtime hours were actually worked by the aide.

Nor do we find that LPNs use independent judgment in finding replacement employees for aides who report off. The process of requesting off-duty aides to work an additional shift, or requesting on-duty aides to work beyond their scheduled time, is necessitated by patient needs and is not the exercise of independent discretion on the part of the LPN. Nor is there any record evidence to indicate that LPNs exercise any independent judgment in the selection of a replacement employee.

The Employer contends that LPNs' completion of incident reports is evidence of their supervisory authority. To the contrary, we find that the LPNs' role with respect to incident reports is limited to reporting the

incident as described by the aide, and does not require the exercise of any independent judgment.

Based on the foregoing, we conclude that LPNs do not exercise statutory supervisory authority in making assignments and directing the work of aides.

B. Transfer

The Employer contends that LPNs have authority to effectively recommend the transfer of aides. The record shows that in one instance, Staff Development Coordinator Ware solicited the opinion of LPN Michaelyn Huda to determine which of two aides who requested a transfer would receive the transfer. Huda replied that she worked well with both aides. Despite Huda's favorable recommendation, Ware decided to give the transfer to a third aide, without consulting Huda about the aide's performance. Under these circumstances and in the absence of other evidence of transfer recommendations, it is clear that LPNs do not have the authority to effectively recommend the transfer of aides.

C. Discipline

When an aide fails to properly carry out an assigned duty or engages in misconduct, LPNs and RNs document such conduct on "incident reports" or "corrective action" forms.³ LPNs complete these forms at the direction of an RN or the director of nursing. In some instances, the RN supervisor prepared the corrective action form, gave it to the LPN for her signature, and instructed the LPN to deliver the form to the aide.

The administrator testified that she receives all incident reports and independently determines whether they need to be investigated. If she determines that an investigation is warranted, she gives the incident report to an RN to investigate. The administrator testified that she does not act on a report from an LPN without an independent investigation.

Once investigated, the incident reports and corrective action forms are placed in the personnel files, which are locked in the assessment office. The assessment office is regularly occupied by the RN coordinator and only RNs have keys to this office. The administrator testified, however, that she instructed the RN coordinators to permit LPNs access to the assessment office, although the record shows that this is not the actual practice. Thus, LPNs generally are not able to review employee personnel files. This role is clearly reserved to the RN supervisors or the administrator.

The record further shows that LPNs do not administer discipline without the approval of an RN or higher management. For instance, LPN Buddy Lambert met with an aide in the administrator's office to review

the aide's conduct. With the approval of the administrator, Lambert informed the aide that she would be suspended for 3 days. In another instance, LPN Retha O'Kernick was instructed by the RN coordinator to give a 3-day suspension to an aide for absenteeism. In yet another case, LPN Huda was told by an RN to call an aide at home and inform her that she was suspended for unsatisfactory work.

Nonetheless, the employee handbook states that LPNs have the authority to immediately discharge any aide guilty of flagrant violations of company policy such as patient abuse, intoxication, or stealing. The record shows that in one instance, an LPN immediately ordered an aide to clock out when she found the aide fondling a patient.

In those instances where LPNs have recommended disciplinary action, their recommendations were not followed by management. For instance, although LPN Theresa Norton recommended to Staff Development Coordinator Ware that an aide be discharged for poor performance, the aide was never discharged. In another case, LPN Catherine Rogers informed the RN coordinator that an aide was verbally abusive to a resident and reported the incident on a corrective action form. When Rogers questioned the RN coordinator and director of nursing about the resulting discipline, they told her that they did not feel they had enough evidence to write her up.

LPNs are also responsible for documenting absences, also referred to as "report-offs." The Employer contends that the LPNs, in doing so, are required to follow the progressive disciplinary system set forth in the employee handbook and to issue discipline based on the specific offense committed. The policy states, *inter alia*, that an employee is automatically terminated on his or her third report-off, but that the employee retains the right of appeal to the administrator. Despite this written policy, the record shows that LPNs consult with their RN coordinator before disciplining any employee for absenteeism. Further, as noted above, LPNs generally do not have access to personnel files in order to determine the number of offenses previously committed. Thus, they are unable to recommend discipline based on absenteeism without first consulting an RN supervisor.

Based on the above record evidence, we find that although LPNs report incidents of misconduct and failures in patient care on "corrective action forms," these forms do not lead to personnel action without an independent investigation by the administrator or an RN. Nor does the record show that the report-off slips completed by LPNs constitute discipline at the hands of LPNs. Rather, the LPNs' role in documenting misconduct and absences is merely reportorial; LPNs consult with an RN coordinator before any discipline is administered. Accordingly, the LPNs' authority to

³In 1992, the incident reports were renamed "corrective action" forms. The record shows that both documents have been used to report incidents, accidents, and misconduct.

complete corrective action forms or report-off slips is not an indicium of supervisory authority. See *Passavant Health Center*, 284 NLRB 887, 889 (1987).

The record also makes it clear that LPNs do not independently administer discipline except in flagrant situations. However, as stated in *Northcrest*, we do not find the authority to discipline in cases of flagrant violations to be an indicium of supervisory status, because such conduct obviously constitutes a violation of company policy and requires no independent judgment on the part of the LPN. *Northcrest Nursing Home*, supra.

D. Evaluation

LPNs complete evaluations for every aide they work with during the relevant review period. They rate the aides' performance in various job performance categories. LPNs, however, do not sign the evaluations, although they may write additional comments on the bottom of the form. Nor do LPNs meet with the aides to review the aides' performance or to discuss the written evaluations. The forms are collected by Staff Development Coordinator Ware who averages the scores, and writes the average score and additional comments on a "summary sheet." The original LPN evaluations are then destroyed and the summary sheet is given to the administrator. The administrator meets with each aide to review her performance.

LPNs are also encouraged to prepare complimentary memos called "atta boys" for aides who perform particularly well. The "atta boys" are shown to the aides and placed in their personnel file.

Although the Employer claims that the evaluations prepared by LPNs are relied on in making personnel decisions, the record does not bear this out. In fact, there is absolutely no record evidence that the evaluations have any effect on wage increases, promotions, job retention, or any other condition of employment. Similarly, there is no evidence that the "atta boys" are considered in the granting of raises, promotions, or any other personnel action. Instead, the record shows that the aides receive scheduled wage increases based not on the appraisal of their work, but on their time in service. Based on this evidence, we conclude that LPNs' evaluations and appraisals of employee performance described above do not render them statutory supervisors. *Northcrest Nursing Home*, supra.

In one instance, LPN Lambert determined that the work of a high school student who was temporarily working at the facility as a part-time aide was inadequate and recommended that the student receive additional training. This recommendation was submitted to Staff Development Coordinator Ware who was in charge of aide training. After the student had received further training, Lambert reported that the student's work had not improved, and that he would not recommend the student for continued employment. Ware

testified that she decided to terminate the student based on complaints from Lambert and another LPN. Even assuming Ware acted solely on the basis of the two LPNs' evaluations, the record shows that this was an isolated instance involving a temporary high school student and is therefore insufficient to render LPNs statutory supervisors on the basis of their evaluations.

III. SECONDARY INDICIA

The Employer points out that there is only one RN on duty on the afternoon and night shifts, and that RNs spend most of their time in the assessment office completing paperwork or on the floor performing specialized nursing procedures which LPNs may not legally perform. Thus, the Employer contends, LPNs are the only meaningful supervisors available to the aides working on the floor.

The Board has held that in the absence of a primary indicia of supervisory status, secondary indicia alone may not confer supervisory status. *Northcrest Nursing Home*, supra. As stated above, we have found that LPNs do not exercise any of the 2(11) indicia. Accordingly, we find that the ratio of supervisory to non-supervisory employees, and the Employer's contention that the LPNs are the only meaningful supervisor on the floor, cannot establish supervisory status.

IV. CONCLUSION

Based on the foregoing and the parties' stipulation, we find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses employed by the Employer at its 461 South Canfield-Niles Road, Austintown, Ohio facility, but excluding all service and maintenance employees, nurse aides, rehabilitation aides, activity assistants, van drivers, central supply employees, dietary employees, housekeeping employees, laundry employees, beauticians, retirement center employees, office clerical employees, office manager, receptionists, medical records employees, licensed social workers, director of nutritional services, food service supervisors, housekeeping/laundry supervisors, nursing supervisors, retirement center directors, staff development instructor, assistant POC coordinator/habilitation nurse, registered nurses, vocational students, nurse aide trainees, technical employees, confidential employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

[Direction of Election omitted from publication.]